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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN NATIONAL BANK AND TRUST COMPANY, RESPONDENT, IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Reasons for Not Granting the Writ	2
Appendix A	11

TABLE OF AUTHORITIES

	PAGE
Case:	
Curtis v. Leavitt, 15 N.Y. 9, 55, 157 (1857) (No other citations available)	3
Statutes:	
76 Stat. 1132 (1962), 12 U.S.C. 1861-1865	2, 3, 4, 11
80 Stat. 236, 237 (1966), 12 U.S.C. 1841-1843	4, 11
81 Stat. 28 (1967), 12 U.S.C. 24	3
5 U.S.C. 702	3
12 U.S.C. 339	4, 6
Legislative Materials:	
H.R. 8874, 87th Congress, 1962	4, 5, 6
H.R. 10595, 90th Congress, 1967	6, 7, 8
S.R. 727, 90th Congress, 1967	8
108 Cong. Rec. 16500	6

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ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

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STATEMENT OF THE CASE

Respondent American National Bank and Trust Company believes that the Statement of the Case in the Petition contains an error. Petitioners therein state:

"* * * In fact, respondent American Bank, at the time petitioners began their action, was performing or preparing to perform such services for the Minnesota State Capitol Credit Union, with whom petitioner Data Sys-

tems had contracted to perform such services, and for Carlen Industries, Inc., with whom Data Systems had been negotiating regarding such services." (Pet., page 3)

It is our contention that the allegations of the complaint fall far short of any contract between petitioner Data Systems and Credit Union, and apparently the Eighth Circuit Court of Appeals in this case was of the same opinion (Pet. App. B, page 24) as was the District Court (Pet. App. A, page 15, footnote 3).

REASONS FOR NOT GRANTING THE WRIT

Respondent American National Bank and Trust Company takes the position that the decision below is correct. The conflict between this decision and the one obtained in the consolidated cases of *Arnold Tours, Inc., et al. v. William B. Camp, et al.*, and *The Wingate Corporation v. Industrial National Bank, et al.* (Pet. App. E, page 36), may be resolved by refusing to grant certiorari in this case and by the granting of certiorari in *The Wingate Corporation* case. The District Court in each of these conflicting cases dismissed the complaints for lack of standing, and in the instant case, the Eighth Circuit Court affirmed but in *The Wingate Corporation* case the First Circuit reversed, holding that a statutory aid to standing is found in the Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. § 1864 (Pet. App. E, pages 44-46). In the companion case to *Wingate Corporation*, i.e., *Arnold Tours, Inc., et al. v. William B. Camp, et al.* (Pet. App. E, page 36), the First Circuit in its opinion found that the plaintiff and some 40 independent travel agencies did not have standing to question the South Shore National Bank's right to engage in a complete travel agency business.

All of these cases involve an interpretation and application of the powers granted national banking associations as set forth in 12 U.S.C. § 24 (Pet. App. D, page 35) and the effect, if any, on the question of standing of 12 U.S.C. § 1864, Subsection 4 (Pet. App. D, page 35). The language in 12 U.S.C. § 24, Section Seventh, is very similar to a section of the New York Statutes interpreted by the New York Court of Appeals in the case of *Curtis v. Leavitt*, 15 N.Y. 9, 55, 157 (1857). This case at page 55 quotes the incidental powers section of the New York law as follows:

> "Such associations shall have the power to carry on the business of banking by discounting bills & c., by receiving deposits, by buying and selling bullion, coins, and exchange, by loaning money on real and personal estate, *and by exercising such incidental powers as shall be necessary to carry on such business.*" (Emphasis added.)

The New York Court of Appeals on page 157 made this comment:

> "The implied powers exist by virtue of the grant, and sagacity can foresee what implied powers may, in the progress of time, the discovery and perfection of better methods of business, and the ever varying attitude of human relations, be required to give effect to the expressed powers. They are therefore left to implication."

The only distinction of note between the instant case and *Wingate Corporation* is that the First Circuit concluded the plaintiff was within the class of persons intended to be protected by the Bank Service Corporation Act. We therefore focus our argument on that Act. While petitioners claim the Administrative Procedure Act, 5 U.S.C. § 702, is involved, we merely wish to point out that the First Circuit rejected this

(Pet. App. E, page 42) as did the District Court in the instant case (Pet. App. A, page 16), and that petitioners did not argue its application before the Eighth Circuit Court of Appeals (Pet., page 10).

We suggest that the total legislative history of the Bank Service Corporation Act, including the specific language of the Act itself, considered with the legislative history of the so-called Antilottery Law, 12 U.S.C. § 339, should lead to the conclusion that the Bank Service Corporation Act did not restrict the activities of any bank but only the activities of a bank service corporation which, under 12 U.S.C. § 1861(c) and § 1862(a), has to be the creature of two or more banks. (App. A, p. 11). Thus, Congress in the Bank Service Corporation Act limited the activities of two or more banks in combination but is silent on the same activities of a single bank. Similarly, the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 and § 1842 (App. A, page 11), requires only multi-bank holding companies to divest themselves of all non-banking interests. Thus, a single bank holding company might engage in providing data processing services directly or through a subsidiary corporation. We urge that inasmuch as the respondent Bank here is not a bank service corporation, the Bank Service Corporation Act should have no bearing on the issue of standing.

It was a well-known fact that at the time of the hearings on H.R. 8874 (which as amended later became law and is known as the Bank Service Corporation Act), that banks were doing data processing for other banks and business concerns. The opening statement of Chairman Martin of the Federal Reserve Board at the House hearing in July 1962 bears this out:

"Next, I will offer some observations and suggestions concerning the bill H.R. 8874, which would authorize member banks of the Federal Reserve System to invest in 'bank service corporations'. * * *

"The bank service corporations established under the bill would serve as a means whereby banks—and especially small and medium-size banks—and their customers could benefit from the improved efficiency and economies possible today only through automation. * * *

"Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and some banks that have purchased or leased this equipment are doing data processing *for other banks and business concerns.*

"Under the bill, two or more banks would be able to pool their resources through the corporate device in order to gain the benefits—for themselves and for their customers—of this expensive equipment. This approach to the problem is not now open to member banks, because they are quite limited by the Federal banking laws as to the stock or securities that they may acquire. Of course, even if this bill is enacted, State member banks will be able to invest in bank service corporations only if authorized to do so by State law, but I understand that at least six States have recently enacted laws that specifically authorize such investments by State banks." (House Hearings on H.R. 8874, 87th Congress, pages 33-34) (Emphasis added.)

Congressman Multer made it clear that the purpose of H.R. 8874 was to enable smaller banks to get access to up-to-date processing equipment and other clerical services and that it was not intended to restrict the rights or powers of banks.

> "Mr. Chairman, I would like to make clear that the bill is not intended to go outside of the very language appearing in this bill. It is not intended to interfere with any of the rights banks now have, and as they do presently, to arrange for any of these services to be performed for them by independent agencies or independent contractors. This will not interfere with any authority now vested in banks by virtue of any of the banking laws of either the State governments or the Federal Government. It merely sets up a new means by which individual banks can acquire these additional services." (108 Cong. Rec. 16500)

The language of a bill itself is clear. It does not restrict the activities of any bank but merely the activities of a bank service corporation. Section 4 of the Act reads as follows:

> "No bank service corporation may engage in any activity other than the performance of bank services for banks."

Clearly, if Congress intended to preclude banks from performing data processing services for others, it could have included a section prohibiting banks from doing so.

On at least one occasion Congress was made aware that banks were performing data processing services for customers, and this occasion was in connection with the so-called Antilottery Laws, 12 U.S.C. § 339, et seq. A bill, H.R. 10595, 90th Congress, was introduced which in its original form would have prohibited banks from performing data processing services for lotteries. The Senate made it clear that

banks were to be able to continue such services by deleting the prohibition on data processing by banks for lotteries. Thus, Senator McIntyre in a letter to Senator Proxmire, printed at page 21 of the Senate Hearings on H.R. 10595, stated in part:

> "* 1 * For example, the Sweepstakes Commission maintains a checking account in a commercial bank. It leases safe deposit facilities. *It has contracted for time on automatic data processing equipment.*
>
> "These relationships with financial institutions are clearly within the right of an agency of a State of the United States. Nevertheless, it is my belief that each of them would be prohibited by the enactment of H.R. 10595. I would hope that the Subcommittee on Financial Institutions would find it possible to amend H.R. 10595 so that State agencies would be permitted to continue making normal use of financial institutions, regardless of the particular responsibilities of those agencies." (Emphasis added.)

On November 6, 1967, about five years after the passage of the Bank Service Corporation Act, Senator Proxmire made the following statement to the Senate committee on banking in connection with the so-called Antilottery Law, H.R. 10595, 90th Congress:

> "In recommending this legislation, the committee approved amendments which permit federally insured banks and savings and loan associations, to engage in *recordkeeping activities* and to perform other custodial functions on behalf of the State lottery. Such institutions would be forbidden to sell lottery tickets directly to the public or to advertise or promote the lottery, but they could perform other services such as *recordkeeping, data processing,* as well as the acceptance of the proceeds of

the lottery ticket sales for delivery, payment, or transfer to the State. Banks would also be permitted to distribute lottery tickets to duly authorized sales agents of the State and could make payment to the winners in such lotteries. *Since these are common bank services which are already performed for other bank customers, the committee does not believe it feasible or practical to prohibit banks from performing these same services on behalf of a State lottery.* However, the direct sale of lottery tickets to the general public is not incident to the business of banking and would be prohibited by the bill." Senate Report No. 727, 90th Congress. (Emphasis added.)

Thus, it appears that Senator Proxmire understood clearly that the Bank Service Corporation Act did not prohibit banks (as distinguished from bank service corporations) from performing data processing for its customers. The original proposed Antilottery Law, H.R. 10595, had a specific provision prohibiting insured banks from performing data processing services for lotteries which incidentally would have been unnecessary as far as national banks are concerned if they were already prohibited by national banking laws from doing so. If Senator Proxmire and other legislators were not convinced that national banks had the power to do data processing services, mere deletion of this prohibition in the proposed antilottery legislation would not have given such banks any additional powers. In the light of Senator Proxmire's foregoing statement and his own particular evaluation of the amendments, it wouldn't appear that he originally intended the Bank Service Corporation Act to prohibit national banks from doing data processing for bank customers or, at the very least, he recognized that no such purpose had been accomplished.

By reason of the fact that Congress did not see fit to specifically prohibit banks, as opposed to bank service corporations, from performing data processing services for their customers and the general public at the time of the passage of the Bank Service Corporation Act, and inasmuch as it went out of its way to be sure that banks would not be prohibited from doing data processing work for lotteries by amending the Act as originally proposed, it would appear that Congress has made no effort to protect petitioners as a class, and that they should not be granted any standing. Similarly, Congress, by exempting single bank holding companies from the Bank Holding Company Act, has in effect permitted banks to indirectly engage in any outside activity including data processing for the public.

If standing be granted in the instant case and a decision on the merits ensues, regardless of the outcome, it will be just a beginning of a vast amount of litigation as most every case will differ in determining what is incidental and necessary to banking. Factors such as the capital structure of the bank, the nature and kind of its competition, the economics of large computers versus small computers, the percentage of data processing work done for itself as compared to other customers, the type and kind of data processing such as payroll accounts, accounts receivable, and limitless other evidentiary matters may well be pertinent, thus, to give to every competitor seeking to eliminate competition the right to challenge alleged ultra vires acts of national banks, would result in the courts taking over in large measure the supervisory powers of the various administrative agencies charged with the duty of regulating and controlling national banking associations.

It is respectfully requested that for all of the foregoing reasons, the Petition for Ceriotari be denied.

Respectfully submitted,

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APPENDIX A

12 U.S.C. § 1861(c):

"(c) The term 'bank service corporation' means a corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of such corporation, and at least one of which is subject to examination by a Federal supervisory agency."

12 U.S.C. § 1862 (a):

"(a) No limitation or prohibition otherwise imposed by any provision of Federal law exclusively relating to banks shall prevent any two or more banks from investing not more than 10 per centum of the paid-in and unimpaired capital and unimpaired surplus of each of them in a bank service corporation."

12 U.S.C. § 1841(a):

"(a) 'Bank holding company' means any company (1) that directly or indirectly owns, controls, or holds with power to vote 25 per centum or more of the voting shares of each of two or more banks or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of each of two or more banks; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no bank and no company owning or controlling voting shares of a bank shall be a bank holding company by virtue of such bank's ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section, (B) no company shall be a bank holding company by virtue of its

ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis, and (C) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virture of its control of voting rights of shares acquired in the course of such solicitation."

12 U.S.C. § 1843(a):

"(a) Except as otherwise provided in this chapter, no bank holding company shall—

(1) after May 9, 1956, acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or, in the case of any company that has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares. * * *"